IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-376

JEROME MACKEY,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

FREDERICK E. WEINBERG
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To the Honorable, the Chief Justice of the United States and the Associate Justices of the United States Supreme Court.

Petitioner, Jerome Mackey, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on June 23rd, 1976, affirming a judgment of the United States District Court for the Eastern District of New York convicting him of devising a scheme to defraud involving the use of the United States mails.

Opinions Below

The Court of Appeals wrote an opinion which is not yet officially reported. A copy is annexed hereto as Appendix A.

There was no opinion in the District Court, except an opinion rendered upon its denial of petitioner's motion to dismiss the indictment by reason of the improper presentation of privileged testimony to the indicting grand jury. A copy of that opinion is annexed hereto as Appendix C.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on June 23rd, 1976. A copy of the judgment is annexed hereto as Appendix A.

A timely petition for rehearing with suggestion for rehearing *en banc* was denied in orders entered on August 18th, 1976, copies of which are annexed hereto as Appendix B and Appendix B-1.

No application has been made for an extension of time in which to file this petition.

The Court's jurisdiction is invoked pursuant to 28 U.S.C. Sec. 1254(1).

Questions Presented

1. Whether petitioner's awareness that certain salesmen had made fraudulent promises was, *ipso facto,* sufficient to establish that he had devised a scheme to defraud as alleged in the indictment.

2. Whether petitioner's instruction to his attorney to sell to the co-defendant Nelson and to Taylor his stock in Mackey's Judo, Inc., of which Mackey Distributors, Inc. was a subsidiary, was privileged and, if so, whether that attorney's testimony to the indicting grand jury which repeated petitioner's instruction to him and described the transaction required the dismissal of the indictment.

Relevant Statutes

18 U.S.C. § 1341:

"§ 1341. FRAUDS AND SWINDLES.

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or

both. (June 25, 1948, ch. 645, 62 Stat. 763; May 24, 1949, ch. 139, § 34, 63 Stat. 94; Aug. 12, 1970, Pub. L. 91-375, § (6)(j)(11), 84 Stat. 778.)"

18 U.S.C. § 1342:

"1342. Fictitious Name or Address.

Whoever, for the purpose of conducting, promoting, or carrying on by means of the Postal Service, any scheme or device mentioned in section 1341 of this title or any other unlawful business, uses or assumes, or requests to be addressed by, any fictitious, false, or assumed title, name, or address or name other than his own proper name, or takes or receives from any post office or authorized depository of mail matter, any letter, postal card, package, or other mail matter addressed to any such fictitious, false, or assumed title, name, or address, or name other than his own proper name, shall be fined not more than $1,000 or imprisoned not more than five years, or both (June 25, 1948, ch. 645, 62 Stat. 763; Aug. 12, 1970, Pub. L. 91-375, § 6(j)(12), 84 Stat. 778.)"

Statement of Case

The indictment charged that petitioner together with the co-defendant Nelson and one Richard E. Taylor had devised a fraudulent plan or scheme to sell, under the name of Mackey Distributors, Inc., distributorships for the sale of stereo tapes and equipment; and that that scheme had involved the use of the United States mails (Appendix D). It alleged the scheme to have been in violation of Title 18, United States Code, Sections 1341 and 2.

The only testimony of what the agreement had been was furnished by the prosecution witness Taylor. He testified that it had been a tripartite profit-sharing agreement. He testified that one of the terms of the agreement was that the purchasers of the distributorships "were to be told just what they were getting into" (Record, p. 237). No part of his testimony revealed any intention to misrepresent or otherwise defraud the purchasers of the distributorships. It was established without contradiction that petitioner did no selling and gave no instructions to the salesmen.

A number of purchasers having testified that they had not received what the salesmen had promised, the jury returned a verdict of guilty against petitioner under 6 counts of the indictment. The Court of Appeals affirmed. It stated in its opinion that the testimony showed that petitioner and the co-defendant Nelson "were aware of the fraudulent promises being made" (Appendix A).

One Thomas Mazza was petitioner's former attorney. He testified before the indicting grand jury that petitioner had instructed him to prepare an agreement under which Mackey's Judo, Inc., in which petitioner had an interest, would sell all its stock to the co-defendant Nelson and Taylor (Appendix D, p. 8). Mackey's Judo, Inc., was the parent corporation, owning all the outstanding stock of Mackey Distributors, Inc. By that transaction, therefore, petitioner had transferred, through the sale of his stock in Mackey's Judo, Inc., his interest in Mackey Distributors, Inc. to the co-defendant Nelson and Taylor. That testimony of petitioner's former lawyer was the only testimony presented to the indicting grand jury which described the transaction whereby petitioner had given the co-defendant Nelson and Taylor an interest in the profits of Mackey Dis-

tributors, Inc. Petitioner did not waive his right to object to the presentation of that testimony before the grand jury.

At the trial petitioner moved to dismiss the indictment upon the ground that his former attorney had given the indicting grand jury information which was privileged, since revealed confidentially to his attorney in the course of the attorney and client relationship. The motion was denied. In the opinion of the trial court which accompanied his denial of that motion the court stated that "the indictment was supported by ample non-privileged evidence." (Appendix C, p. 38). That reasoning was approved by the Court of Appeals (Appendix A, p. 2).

The Reasons for Allowing a Writ of Certiorari

First Reason.

In a prosecution for the crime of devising a fraudulent plan, "there must be proof of an unlawful agreement and participation therein with knowledge of the agreement" (1932) *Pelz* v. *United States* (C.A. 2d Cir.), 54 F. (2d) 1001, 1005.

The only evidence of the terms of the agreement between the three men which related to their conduct thereunder was Taylor's testimony that the purchasers of the distributorships were to be told "just what they were getting into." Thereby the absence of any evidence that petitioner had devised a scheme to defraud was accompanied by testimony of the prosecution's witness, unequivocal and uncontradicted, that there was to be no misrepresentation of any kind.*

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* Petitioner's motions to dismiss and to set aside the verdict were denied.

The injustice to this petitioner from this conviction is not the sole reason why the writ should be allowed. Under the principle implicit in petitioner's conviction, United States Attorneys may hereafter employ the mail fraud statute to the end of usurping the heretofore exclusive jurisdiction of the state courts over prosecutions for fraud. They will be able to do this simply by preparing indictments which charge the devising of a fraudulent plan involving the use of the United States mails, and then conducting the trial without producing any proof of such a plan. That was the procedure in this case.

If this device for extending the jurisdiction of the United States courts is to be authorized, that practice should not be introduced inadvertently and without explicit recognition. This situation warrants the deliberative consideration of this court.

Second Reason.

Petitioner's instruction to his attorney Mazza to sell his stock in Mackey's Judo, Inc. to the co-defendant Nelson and to Taylor was confidential and made in the course of the attorney and client relation. The prosecution had the burden of showing that it had not used that information or any information even indirectly derived therefrom. Otherwise the indictment will be dismissed. (1973) *Goldberg* v. *U.S.* (C.A. 2d Cir.), 472 F. (2d) 513, 516; (1953) *U.S.* v. *Lawn* (D.C.S.D. of N.Y), 115 F. Supp. 674.

The prosecution cannot show that the grand jury had not been influenced by the foregoing testimony in handing down the indictment. On its face, the contrary is probable. The premise upon which the indictment proceeded and which, in fact, it alleged was that petitioner, the co-defendant

Nelson and Taylor had a community of interest in the sale of stereo tape distributorships by Mackey Distributors, Inc.

The privileged testimony given to the indicting grand jury by the petitioner's former attorney could have had a still more damaging significance. The transaction which that attorney described was a circuitous one. Petitioner sold an interest in the profits to be made by Mackey Distributors, Inc. by way of a transaction which nominally passed title only to stock in the parent corporation, Mackey's Judo, Inc. In the perspective of laymen, that might have appeared as an indirection bespeaking a fraudulent concealment. Thus, the transaction of sale which petitioner had confidentially instructed his attorney to conduct might very well have predisposed the grand jury to view the entire relationship between the three men with a jaundiced eye.

The trial court's stated rationale for his refusal to dismiss the indictment even if the grand jury had been given privileged testimony missed the real point. Assuming *arguendo* that there had been ample proper evidence upon the basis of which an indictment might have been handed down, that fact would not have made this privileged testimony harmless. The question is not whether the proper testimony presented to the grand jury would have been sufficient to support an indictment, *if* handed down. Rather, the question is whether, if the privileged testimony had not been presented, there would have been an indictment at all. Petitioner was entitled to a determination by the grand jury which had been based only upon the presentation to it of proper testimony.

Any conjecture which might be made to the effect that the grand jury might have indicted even in the absence of

the privileged testimony is inappropriate. No one can really substitute himself for the grand jury and speculate as to what its determination would have been in the event that certain testimony which had been presented to it had been omitted.

There is still another aspect of this privileged testimony. As already shown, the prosecution did not produce even a scintilla of testimony of a fraudulent agreement. Since the one witness who testified to the terms of the agreement between the three men (Taylor) must have been interviewed by the United States Attorney, one is compelled to wonder about the source of the United States Attorney's belief that there had been a fraudulent agreement at all. It seems probable that the entire basis for the charge of a fraudulent agreement had been simply a construction, an idea which had seemed probable to someone upon the basis of the transaction which petitioner's former attorney had described.

CONCLUSION

For the above-stated reasons, the writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

JUDGMENT OF U.S.C.A. SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 23rd day of June, one thousand nine hundred and seventy-six.

Present:

HONORABLE HENRY J. FRIENDLY
HONORABLE WILFRED FEINBERG
HONORABLE ELLSWORTH A. VAN GRAAFEILAND

Circuit Judges,

- X

UNITED STATES OF AMERICA,

Appellee,

-against-

JEROLE MACKEY and WILLIAM NELSON,

Defendants-Appellants.

- X

No. 76-1118

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

Jerome Mackey and William Nelson appeal from their convictions after a jury trial before Judge Weinstein for executing a scheme to defraud through the mails, 18 U.S.C Sec. 1341. The fraudulent scheme charged was the sale of tape distributorships by means of false and misleading promises. The 21 count indictment charged 15 individual mailings of misleading advertisements and receipt of six checks through the mail. One of the advertisement counts was dismissed on government motion during trial. Nelson was convicted on all the remaining advertisement counts and Mackey on six of them. Both defendants were acquitted on the check counts. They were sentenced to five years imprisonment on each count to run concurrently, sentences suspended on four and one-half years of each count conditioned on probation.

Both appellants question the sufficiency of the evidence to show that they knowingly participated in a scheme to defraud through the mails. Viewing the evidence in a light most favorable to the Government, as we are required to, both defendants were aware of the fraudulent promises being made and Nelson actually learned and employed the fraudulent sales pitch used to induce custom-

ers. Nelson also participated in the deception of customers after the departure of a co-defendant, who testified for the Government. Mackey knew of the past dubious sales techniques used by a salesman hired with his permission. Both Nelson and Mackey knew that inferior tapes were being provided instead of the brand names promised and when the scheme collapsed, Mackey expressed confidence that the dissatisfied customers would never collect because the assets of the company had been transferred.

Appellants also claim that the jury's guilty verdict must be set aside as inconsistent. It has been settled since Steckler v. United States, 7 F.2d 59 (2d Cir.1925) (L. Hand, J.), and Dunn v. United States, 284 U.S. 390 (1932)(Holmes,J.), that this is not a ground for reversal, and we have declined the invitation to depart from this rule. United States v. Carbone, 378 F.2d 420 (2d Cir. 1967)(Friendly,J.). Moreover, the veridct is not really inconsistent. It is true that Nelson and Mackey were convicted on the misleading advertisement but aquited on the check counts. But the jury might have felt

that appellants did not profit substantially from the scheme and allowed that to influence them on the check counts. Also, the jury might have had a reasonable doubt that appellants knew that these checks were mailed rather than hand delivered. Similarly, a key meeting between Mackey and a co-defendant might explain Mackey's acquittal on the counts involving advertisement mailings that antedated that meeting. Finally, appellants's claim that the guilty verdict was the result of prejudicial and irrelevant testimony by victims of the scheme was not preserved for review since no objection was made to any such testimony.

Individually, Newlson contends that the judge's "conscious avoidance" charge was inadequate and should not have not have been used on these facts. However, the charge taken as a whole was balanced and appropriate. Nor did the judge err in refusing to grant Nelson an adjournment when he changes counsel on the eve of trial. Counsel did have five days to prepare and he failed to renew his motion at any point during the trial. Also,

the judge properly exercised his discretion in excluding a complaint filed with the Nassau County District Attorney, since the fact of the filing was stipulated to and the content of the complaint was self-serving hearsay.

Finally, Mackey claims that his indictment was invalid because essential information before the grand jury was improperly obtained from his lawyer in violation of his attorney-client privilege. we reject the argument substantially for the reason set forth in Judge Weinstein's opinion, reported at 405 F. Supp. 854 (E.D.N.Y. 1975).

18 C.J.C. 2231

We have considered all the points raised by appellants and find them unpersuasive. Judgments of conviction affirmed.

Henry J. Friendly

Wilfred Feinberg

Ellsworth A. Van Graafeiland

U.S.C.JJ.

APPENDIX B

ORDER DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS SECOND CIRCUIT

At a Stated Term of the United States Court of Appelas, in a for the Second Circuit, held at the United States Courthouse, in the City of New York, on the eighteenth day of August, one thousand nine hundred and seventy-six.

Present:

HON. HENRY J. FRIENDLY
HON. WILFRED FEINBERG
HON. ELLSWORTH A. VAN GRAAFEILAND

Circuit Judges

----------X

United States of America,

Plaintiff-appellee,

-against-

Jerome Mackey, Richard E. Taylor,
William Nelson,

Defendants,

William Nelson, Jerome Mackey,

Defendants-appellants.

----------X

A petition for a rehearing having been filed herein by counsel for the appellant, Jerome Mackey,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO

Clerk

APPENDIX B1

ORDER DENYING PETITION FOR REHEARING IN BANC

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the eighteenth day of August, one thousand nine hundred and seventy-six.

---X

United States of America,

Plaintiff-Appellee,

~~-against-~~
v

Jerome Lackey, Richard E. Taylor, William Nelson,

Defendants,

William Nelson, Jerome Mackey,

Defendants-Appallants.

---X

A petition for rehearing containg a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant, Jerome Mackey, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that the petition be and it hereby is DENIED.

IRVING R. KAUFMAN,

Chief Judge

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- x

UNITED STATES,

- against -

JEROME MACKEY and WILLIAM NELSON,

Defendants.
- x

75 CR 468

MEMORANDUM
and
ORDER

Appearances:

HONORABLE DAVID G. TRAGER
United States Attorney
Eastern District of New York

By: HAROLD J. FRIEDMAN
Assistant United States Attorney
For Government

GROMAN, WOLF & ROSS, P. C.
Carle Place, New York

By: MARVIN WOLF, Esq.
For Defendant Mackey

McCARTHY, DORFMAN & BRENNER, Esqs.
Mineola, New York

By: DAVID W. McCARTHY, Esq.
For Defendant Nelson

WEINSTEIN, D. J.

The defendants, Jerome Mackey and William Nelson, were charged with mail fraud arising from their management of Mackey Distributors, Inc. 18 U.S.C. § 1341. Distributors

was organized in 1972 for the purpose of selling stereo tape distributorships. Mackey was president and Nelson secretary-treasurer.

During the course of the grand jury investigation the government called as a witness an attorney, Thomas Mazza. Mr. Mazza testified that he had been retained by Jerome Mackey to draw the incorporation papers for Distributors. The testimony was relevant since it showed that Jerome Mackey took an active interest in the new corporation; this made it more likely that he would know of the fraudulent promises made by its salesmen.

The defendants contend that Mazza's testimony violated the attorney-client privilege. Having been found guilty by a jury, they renew their motion to dismiss the indictment. As indicated below, this motion must be denied because the existence of a privilege is doubtful, but even if the privilege had been violated, a dismissal would be unwarranted.

I.

CLAIM OF PRIVILEGE

Defendants' claim of privilege requires consideration of the effect of the new Federal Rules of Evidence. The grand jury proceedings in question took place on June 5, 1975. The Rules of Evidence were enacted effective July 1, 1975. Public Law 93-595, 88 Stat. 1926-1949. The trial was commenced on September 29, 1975. In the preamble to the Act, the usual escape clause is found allowing the prior rules of evidence to operate in pending litigations where the Rules "would not be feasible, or would work injustice." The preamble reads in part as follows:

> "These rules apply to actions, cases, and proceedings brought after the rules take effect. These rules also apply to further procedure in actions, cases, and proceedings then pending, except to the extent that application of the rules would not be feasible, or would work injustice, in which event former evidentiary principles apply."

Since the grand jury proceedings were completed prior to the Rules having taken effect, and the motion is directed at those grand jury proceedings rather than at the proceedings during the trial, it would be reasonable to

apply "former evidentiary principles." The United States Attorney who was conducting the grand jury proceedings, should obviously not be charged with any failure with respect to a rule subsequently adopted. No Rule of Evidence in effect at the time of trial was violated because the testimony of the attorney was not offered at the trial. Nevertheless, as we shall show below, there is no difference of substance between the principles governing the instant case under the Federal Rules of Evidence and prior practice.

In understanding what those prior practices are it is useful to consider the present Rules of Evidence. Drafted as they were by an Advisory Committee whose members were actively engaged in litigation and approved by the Supreme Court, which is itself engaged in reviewing litigation, as well as by Judiciary Committees of Congress made up of attorneys who were aware of prior practice, the Rules in general are consonant with prior procedure. In turn, earlier practices are useful in interpreting the meaning of the Rules themselves. We know, too, that on the floor of the Congress the debate on the Rules was limited to a relatively small group of Congressmen and Senators who were, in fact, particularly concerned with, and learned in, the arts of litigation.

Thus, all those involved in the creation and enactment of the Federal Rules of Evidence were learned in the law. We may, in general, assume, therefore, unless otherwise indicated by legislative history or Advisory Committee Commentary, that the enacted Rules reflect the learning and experience of the drafters under prior practice. Accordingly, in the discussion which follows we have relied heavily on the present Federal Rules of Evidence as explicating practice at the time the grand jury met.

There is no question that under the Federal Rules of Evidence the attorney-client privilege applies to grand jury proceedings. Rule 1101(c) expressly states that "[t]he rule with respect to privileges applies at all stages of all actions, cases, and proceedings." In addition, Rule 1101(d), which provides that the rules of evidence shall not apply to proceedings before grand juries, specifically excepts the rules governing privileges.

While the Supreme Court promulgated a comprehensive article covering privileges, including that for attorneys and clients, Congress eliminated specific references to any privileges. Compare 56 F.R.D. 184, 230 ff. (1973) with Article V of the Federal Rules of Evidence. The only provision of the enacted Rules covering testimonial privileges in criminal cases embodies "principles of the common law"

as "interpreted by the Courts of the United States in the light of reason and experience." It reads:

"Rule 501.

GENERAL RULE

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law."

Despite their deletion by Congress, the privilege rules promulgated by the Supreme Court remain of considerable utility as standards. Congress expressed no disagreement with their substance; it eliminated them primarily because they were considered substantive in nature, and not a fit subject for rule making.

The specific rules on privilege promulgated by the Supreme Court are reflective of "reason and experience." They are the culmination of three drafts prepared by an Advisory Committee consisting of judges, practicing lawyers and academicians. In its many years of work, the Committee considered hundreds of suggestions received in response to

the circulation of the drafts throughout the legal community. Finally, they were adopted by the Supreme Court by an eight to one vote. The rule against advisory opinions is only slightly more violated by giving weight to this vote than it would have been had Congress not vetoed these provisions, and had they become "Rules," rather than "standards."

As its commentary indicates, the Advisory Committee in drafting the privilege rules was for the most part restating the law applied in the federal courts. These rules or standards, therefore, are a convenient comprehensive guide to the federal law of privileges as it now stands, subject of course to a considerable flexibility of construction.

The attorney-client privilege was covered by the Supreme Court's Rule 503. The rule, significantly, tracks the common law in the sense that it applies only to "confidential communications." A litigant is entitled to object to adverse testimony by a former attorney only when such testimony would tend to reveal matters disclosed by the litigant in confidence. Subdivision (b) of this Rule stated:

> "(b) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between himself or his representative and his lawyer or his lawyer's representative, or (2) between his lawyer and the lawyer's representative, or (3) by him or his lawyer to a lawyer representing another in a matter of common interest, or (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client."

The minutes of Mazza's testimony before the grand jury reveal very little, if anything, that would qualify as a confidential communication from the defendant Mackey. In substance, Mazza's testimony brought five relevant facts to the attention of the grand jury: 1) in 1972 Mazza represented Jerome Mackey in the formation of Distributors; 2) Mazza filed the certificate of incorporation and was the sole incorporator; 3) he prepared a corporate kit consisting of various documents which he retained until June 7, 1973 at which time he turned the kit over to an employee of Jerome Mackey; 4) he first became aware that Distributors was owned by Jerome Mackey Judo, Inc., another corporation in which Jerome Mackey had an interest, in the fall of 1972; and 5) at that time he prepared an agreement whereby Judo would sell 100% of its stock to Nelson and another person. According to Mazza his sole source for the information

contained in this contract was either Jerome Mackey or an employee of Jerome Mackey.

The employee was a necessary intermediary to transmit the information. See Supreme Court Rule 503(b)(1). Apparently Nelson was never a client and would have no standing to rely on the privilege. In the discussion which follows we shall treat the claim as one by Jerome Mackey only.

Since the minutes indicate that Mazza believed he was acting for Jerome Mackey personally rather than for Jerome Mackey Judo, Inc., we also make that assumption in the analysis which follows. Under other circumstances this issue might present a critical question of fact, requiring a hearing.

The courts have held that ordinarily the concept of a confidential communication does not include the identity of a client or the fact that someone has become a client. Colton v. United States, 306 F.2d 633 (2d Cir. 1962), cert. denied, 371 U.S. 951, 9 L.Ed.2d 499, 83 S.Ct. 505 (1963); United States v. Pape, 144 F.2d 778, 782-783 (2d Cir.), cert. denied, 323 U.S. 752, 65 S.Ct. 86, 89 L.Ed. 602 (1944);

Behrens v. Hironimus, 170 F.2d 627 (4th Cir. 1958); Goddard v. United States, 131 F.2d 220 (5th Cir. 1942); 8 Wigmore, Evidence § 2313 (McNaughton rev. 1961); McCormick, Evidence § 90 (2d ed. 1972). See also, In Re Grand Jury Proceedings, United States v. Ganes, 517 F.2d 666 (5th Cir. 1975). This Circuit has held that the privilege does not prohibit testimony concerning the general nature of the services performed by the attorney. Colton v. United States, supra. There is no reason in this case to depart from the general rule. Facts 1, 2, and 3 above, therefore, were not privileged from disclosure before the grand jury.

The fact that Jerome Mackey Judo, Inc. at one point owned all of Distributors' outstanding stock was nationally publicized and utilized by defendants' salesmen as a selling point when attempting to sell distributorships to potential customers. All the non-privileged evidence showed that this was accomplished with Jerome Mackey's consent. Hence, there can be no claim that that information was given to Mazza in confidence.

This leaves only that portion of Mazza's testimony which indicates that Nelson and another, one Taylor, were to purchase Jerome Mackey Judo, Inc.'s stock in Distributors.

We assume for this discussion that Jerome Mackey, the client, told this to Mazza; had the information come from the non-clients, Nelson or Taylor, there would be no privilege.

One of the central allegations of fraud involved in this case is that the defendants permitted potential customers to think that Distributors was a wholly owned subsidiary of Jerome Mackey Judo, Inc. at a time when Nelson and Taylor owned its stock. Thus, this testimony may have helped persuade the grand jury to indict. The first issue, then, is whether this communication may be deemed confidential for purposes of the privilege.

A corporation is subject to the visitorial powers of the government. A corporate officer or agent holds its books and records subject to examination by authorized representatives of the government. Morgan, Basic Problems of Evidence, 162 (4th ed. 1963). An officer, for example, is generally not entitled by reason of his privilege against self-incrimination to refuse to produce books and records owned by the corporation. Essgee Co. of China v. United States, 262 U.S.151, 43 S.Ct.514, 67 L.Ed. 917 (1923). Thus the names

of shareholders, which are clearly a matter of corporate record, are not normally the kind of confidential information which is subject to the attorney-client privilege. This is true even of a closely held corporation such as Distributors. This case, then, would seem analogous to situations in which the courts have denied a claim of privilege on the ground that information had been given to an attorney with the understanding that it could be transmitted to others. See, e.g., Colton v. United States, 306 F.2d 633, 638 (2d Cir. 1963), cert. denied, 371 U.S. 951, 83 S.Ct. 515, 9 L.Ed. 2d 499 (1963); United States v. Tellier, 255 F.2d 441, 447 (2d Cir.), cert. denied, 358 U.S. 821, 79 S.Ct. 33, 33 L.Ed. 2d 62 (1958); 8 Wigmore, Evidence § 2311 (McNaughton rev. 1961); McCormick, Evidence § 91 (2d ed. 1972).

It is perhaps arguable that Jerome Mackey and Mazza understood that the purchase of Distributor stock by Nelson and Taylor would not be bruited about indiscriminately, though they must have realized that stock ownership would have to be revealed for tax and regulatory purposes. If so, Mazza may have been under an ethical obligation to maintain the confidentiality of that information against non-governmental inquiry. A.B.A. Code of Professional Responsibility,

Canon 4. Certainly, he would have been wrong to circulate this intelligence for commercial purposes without his client's consent. But a lawyer's ethical obligation to protect clients' confidences against the world are broader than his obligation -- or right as defined by the privilege -- to withhold information from a court.

If complete secrecy with respect to the transfer of shares was the intention from the outset it could be argued that there was no privilege. By the fall of 1972 Jerome Mackey would have known that the salesmen's strong selling point was that Distributors was "credible" and reliable because it was a subsidiary of the publicly held Jerome Mackey Judo, Inc. To have deliberately kept the transfer secret would have been, under the circumstances, to have aided a fraud.

Communications in aid of fraud are not privileged. As the Supreme Court's Rule 503(d) put it:

> "(d) Exceptions. There is no privilege under this rule:
> (1) Furtherance of crime or fraud: If the services of the lawyer were sought or obtained to enable or aid anyone to commit what the client knew or reasonably should have known to be a crime or fraud;. . . "

Nevertheless, it cannot be said that the claim of privilege is without some force. Arguably we are on the borderline of the privilege. At any rate, as explicated below, for the purposes of this motion to dismiss we can assume, without deciding, that the communication might be deemed privileged.

II.

POWER OF THE COURT TO DISMISS THE INDICTMENT

The case law governing grand jury practice suggests three conceptual bases upon which dismissal of the indictment might be predicated when a defendant's evidentiary privilege is violated before the grand jury. None assist the defendant.

First is the attorney-client privilege itself. The theory is simple enough -- just as the admission into evidence at trial of testimony which violates the privilege might be ground for reversal, so too admission of such evidence might warrant dismissal of the indictment. 8 Wigmore, Evidence, § 2364 (McNaughton rev. 1961). In short, the right implies an appropriate remedy.

We have found no federal cases raising this precise issue. There is some authority, however, bearing on the consequences of a grand jury's violation of a defendant's constitutional privilege against self-incrimination. United States v. Lawn, 115 F.Supp. 674 (S.D.N.Y. 1953), appeal dismissed as untimely sub nom. United States v. Roth, 208 F.2d 467 (2d Cir. 1953), was a prosecution for wilfully causing a corporation to fail to pay income taxes. An initial information had been filed against several defendants in 1950. In 1952, they were called before a grand jury conducting a further investigation into the same charges. All testified and one defendant produced partnership records. All this evidence was incriminatory. The court held that the defendants had a right to invoke their constitutional privilege against self-incrimination before the grand jury and that in the absence of a specific warning that right had not been waived. The court further noted that it would be a clear violation of the privilege to compel the defendants to testify and produce records at a trial and concluded that

> "for similar reasons, an indictment is invalid if a defendant against whom a criminal information has been filed, is called by the prosecution as a witness before the grand jury to obtain evidence tending to sustain an indictment against him, which supersedes the earlier information."

115 F.Supp. at 677. The court, accordingly, dismissed the indictment. The quoted language -- analogizing the grand jury right to the trial right -- lends some support to defendants' position here.

The Supreme Court, however, shortly thereafter, seemingly rejected the district court's approach in a related case. Lawn v. United States, 355 U.S. 339, 78 S.Ct. 311, 2 L. Ed. 321 (1958). The government had obtained an indictment against the same defendants which superseded the one dismissed by the district court. This new indictment was the product of a separate grand jury investigation. The defendants again moved for dismissal and, in the alternative, for a hearing and for inspection of the grand jury minutes in order to determine whether the government, in procuring the indictment, had used testimony or documents produced before the first grand jury or evidence obtained through leads and clues.

The Court affirmed the district court's denial of this motion on the ground that defendants' affidavits and submissions did not support an inference that the government had made any use of the defendants' prior testimony and documents. But, in rather sweeping dicta, it went on to suggest that government use of that evidence would not have warranted dismissal of the indictment, in any event. Relying principally on Costello v. United States, 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 755, discussed below, the Court said:

> ". . . [t]his Court has several times ruled that one indictment returned by a legally constituted nonbiased grand jury, like an information drawn by a prosecutor, if valid on its face, is enough to call for a trial of the charge on the merits and satisfies the requirements of the Fifth Amendment.
>
> . . .
>
> It should be unnecessary to say that we are not here dealing with the use of incompetent or illegal evidence in a trial on the merits, nor with the right to decline to give incriminating testimony in legal proceedings or to suppress the direct or derivative use at the trial of evidence illegally obtained."

355 U.S. at 349-350, 78 S.Ct. at 317-318.

The distinction drawn between the status of the privilege at trial and before the grand jury is critical. For, although the precise holding of the case was that petitioners were not entitled to a "preliminary hearing to enable them to satisfy their unsupported suspicions," 355 U.S. at 350, 78 S.Ct. at 318, the Court has very recently cited Lawn for the proposition that "an indictment valid on its face is not subject to challenge on the ground that the grand jury acted . . . on the basis of information obtained in violation of a defendant's Fifth Amendment privilege against self-incrimination." United States v. Calandra, 414 U.S. 338, 345, 94 S.Ct. 613, 618, 38 L.Ed.2d 561 (1974).

It would seem to follow, a fortiori, that the right to invoke a common law testimonial privilege, which does not stand on a constitutional footing, does not imply any right to a dismissal of an indictment. The only limitation on this principle has been the suggestion by some courts that an indictment is invalid if it could not be supported without the privileged matter. See United States v. James, 493 F.2d 323 (2d Cir.), cert. denied, 419 U.S. 834, 95 S.Ct. 87 (1974); United States v. Pepe, 367 F.Supp. 1365, 1370 (D.Conn. 1973).

See also People v. Eckert, 2 N.Y.2d 126, 128, 157 N.Y.S.2d 551, 554 (1956) (admission of doctor's testimony in violation of defendant's privilege was improper but indictment would not be dismissed where there was sufficient competent evidence also presented to the grand jury).

In the instant case, there was overwhelming evidence of defendants' mail fraud presented to the grand jury apart from Mazza's testimony. Mere violation of the attorney-client privilege, would not support dismissal.

A second theoretical basis for dismissal is that portion of the Fifth Amendment which guarantees that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury." U.S. Const. Amend. V. The theory here would be that this constitutional protection assumes that the grand jury will conform to the law and confine its deliberations to competent or otherwise legally obtainable evidence. This approach was largely rejected by the Supreme Court in Costello v. United States, 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1956). In Costello the defendant moved to dismiss the indictment on the ground that the only witnesses

to appear before the grand jury were three government investigators who had no first hand knowledge of the acts of tax evasion with which defendant was charged and who were only able to repeat the hearsay declarations of others. Costello argued that an indictment based solely on hearsay violated the Fifth Amendment grand jury provision.

The Court based its analysis primarily on the practices of the early English grand jury.

> "The basic purpose of the English grand jury was to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes. Grand jurors were selected from the body of the people and their work was not hampered by rigid procedural or evidential rules. In fact, grand jurors could act on their own knowledge and were free to make their presentments or indictments on such information as they deemed satisfactory."

350 U.S. at 362, 76 S.Ct. at 408.

The Court concluded that:

> "If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy

> "of the evidence before the grand jury. This is not required by the Fifth Amendment. An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more."

350 U.S. 363, 76 S.Ct. at 408, 409.

Fairly read, Costello may be said to stand for the proposition that the validity of an indictment under the Fifth Amendment is in no way dependent on the legality of the evidence received by the grand jury. Arguably, however, the facts if not the language of Costello are distinguishable in the sense that there defendant's contention went essentially to the reliability and, hence, the sufficiency of the evidence presented to the grand jury. In this case, by contrast, defendant's objection centers on the violation of his right to confidential communication with his attorney -- i.e., on the legality of the government's conduct in obtaining the evidence, in the first instance.

In this connection, the Court's recent decision in United States v. Calandra, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974), affords some additional insight.

Calandra had obtained an order from a district court providing that he need not answer a grand jury's questions which were based upon records seized from his place of business in violation of the Fourth Amendment. The Supreme Court reversed the Sixth Circuit's affirmance, holding that at least where there has not been a prior adjudication that evidence has been illegally seized, a witness who has not been indicted may not invoke the exclusionary rule to secure suppression of evidence nor relief from the duty to testify. See esp. n. 8, 414 U.S. at 352, 94 S.Ct. at 622. It is true that the question in Calandra was the existence of a right to exclude evidence before the grand jury -- a right assumed here -- and that the primary rationale for the decision was the majority's view of limitations on the exclusionary rule. 414 U.S. at 347-355, 94 S.Ct. 619-624. But it is hardly likely that the Court would permit the introduction of illegally seized evidence if it anticipated the dismissal of a resulting indictment on the basis of the Fifth Amendment. This observation, coupled with the reliance placed on its own decision in Lawn v. United States, noted above, indicate that the Court perceives no limitations inherent in the Fifth Amendment on the kind of evidence that may be considered by a grand jury.

The conclusion that an indictment is not invalidated by grand jury reception of illegally obtained evidence is further supported by dicta in United States v. Blue, 384 U.S. 251, 255 n. 3, 86 S.Ct. 1416, 1419, 16 L.Ed.2d 510 (1966) and by a broad consensus of lower court authority. See, e.g., United States v. Doe, 455 F.2d 1270, 1274 (1st Cir. 1972); United States ex rel. Almeida v. Rundle, 383 F.2d 421, 424 (3d Cir. 1967); cert. denied, 393 U.S. 863, 89 S.Ct. 144, 21 L.Ed.2d 131, (1968); United States v. Johnson, 419 F.2d 56, 58 (4th Cir. 1969), cert. denied, 397 U.S. 1010, 90 S.Ct. 1235, 25 L.Ed.2d 423 (1970); Hunter v. United States, 405 F.2d 1187 (9th Cir. 1969).

A number of cases suggest that it may be necessary to dismiss an indictment based entirely on tainted evidence, see, e.g., Laughlin v. United States, 385 F.2d 287, 291 (D.C. Cir. 1967), cert. denied, 390 U.S. 1003, 88 S.Ct. 1245, 20 L.Ed.2d 103 (1968); United States v. Kahn, 366 F.2d 259, 264 (2d Cir.), cert. denied sub nom. Pac[illegible]li v. United States, 385 U.S. 948, 87 S.Ct. 321, 324, 17 L.Ed.2d 226, rehearing denied, 385 U.S. 984, 87 S.Ct. 502, 503, 17 L.Ed.2d 445 (1966); United States v. Isaacs, 347 F.Supp. 743, 757 (N.D. Ill. 1972);

United States ex rel. Pacheco v. Casseles, 312 F.Supp. 554, 556 (S.D.N.Y. 1970). As noted, this is not the case here.

A third basis for dismissal of the indictment would be in the exercise of inherent "supervisory powers" over the conduct of government attorneys before the grand jury. See United States v. Estepa, 471 F.2d 1132, 1136 (2d Cir. 1972).

The Supreme Court in Costello, however, specifically held that this power should not be exercised so as to permit defendants to challenge indictments on the ground that they are not supported by competent evidence. The Court concluded that:

> "[n]o persuasive reasons are advanced for establishing such a rule. It would run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules. Neither justice nor the concept of a fair trial requires such a change. In a trial on the merits, defendants are entitled to a strict observance of all the rules designed to bring about a fair verdict. Defendants are not entitled, however, to a rule which would result in interminable delay but add nothing to the assurance of a fair trial."

350 U.S. at 364, 76 S.Ct. at 409.

Given that dismissal of the indictment is not required by the court's interests in reliable fact finding by the grand jury or in preserving fairness to the defendant, it would seem to follow that the exercise of the court's supervisory power to dismiss can only be justified by extrinsic policy considerations -- specifically, the policy considerations underlying that portion of Rule 1101(d) of the Federal Rules of Evidence which, in conjunction with Rule 1101(c), preserves the common law privilege in grand jury proceedings.

Although the Advisory Committee which drafted the Federal Rules was explicit in setting forth the reasons for not applying the rules of evidence to grand jury proceedings -- relying on the quotations from Costello set out above -- the Committee did not provide similar guidance on why the rules of privilege were excepted from that policy. See Advisory Committee Notes to Rules 1101(c) and (d). Pre-Federal Rules of Evidence cases which have either upheld or recognized the right to invoke a testimonial privilege in a grand jury proceeding are likewise silent as to the reasons for doing so. See, United States v. Pappadio, 346 F.2d 5, 9 (2d Cir. 1965) (attorney client privilege), vacated sub nom. Shillitani v. United States, 384 U.S. 364, 86 S.Ct. 1531, 16 L.Ed.2d 622

(1966); In Re Goldman, 331 F.Supp. 509 (W.D. Pa. 1971) (attorney-client privilege); Blau v. United States, 340 U.S. 332, 71 S.Ct. 301, 95 L.Ed. 306 (1951); United States v. George, 444 F.2d 310 (6th Cir. 1971) (marital privilege); In Re Verplank, 329 F.Supp. 443 (C.D. Cal. 1971) (priest-penitent privilege).

The preservation of the traditional testimonial privileges in the grand jury context is consistent with several policy objectives. One function of the rule is to preserve the secrecy of confidential communications. Subdivision(c) of Rule 1101 supports the view that confidentiality once destroyed cannot be restored, and that a privilege is effective only if it bars all disclosures at all times. Nevertheless, in the grand jury context, this unquestionably serious concern about protecting important relationships is substantially mitigated by several factors. Rule 6(e) of the Federal Rules of Criminal Procedure imposes a strict obligation of secrecy on all jurors, attorneys, interpreters, stenographers, operators of recording devices, and typists involved in a grand jury proceeding. Such persons may disclose matters occurring before the grand jury only to government attorneys for use in the performance of their duties or as otherwise directed by the court.

See 1 C. Wright, Federal Practice and Procedure [Criminal] § 106 (1969). It is true that no such obligation is imposed on the witness, but there is no reason to assume that testifying before a grand jury will render a privileged communicant more likely to disclose confidential matter in the future.

At trial additional protections come into play. It is axiomatic that a testimonial privilege can only be waived by the holder. Accordingly, the revelation of privileged matter before the grand jury by an attorney, for example, would not constitute a waiver of the client's privilege so as to entitle the government to introduce that matter at trial. Supreme Court Rule 512 expressly provided that a disclosure of privileged information is not admissible against a holder who had no opportunity to claim the privilege. The rule provided:

"Rule 512.

Privileged Matter Disclosed Under Compulsion or Without Opportunity to Claim Privilege.

Evidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege if the disclosure was (a) compelled erroneously or (b) made without opportunity to claim the privilege."

Since the defendant Jerome Mackey was not before the grand jury when the testimony was given, he had no opportunity to claim the privilege. He would have been entitled, therefore, to object to Mazza's testimony at trial had it been offered by the government. It is also significant that where the holder of the privilege is called before the grand jury and compelled erroneously to testify, Supreme Court Rule 512 would provide that no waiver occurs.

Congress struck Rule 512 but, as already noted, the provision still is useful as a standard. Accordingly, the defendant would retain his right to invoke the privilege at trial, either to exclude testimony by the communicant or to bar introduction of his own prior statement as an admission. In addition, the court would have some discretion to bar the fruit of the privileged testimony, at least where the government was a party to the improper breach.

Finally, Supreme Court Rule 513 would prohibit any comment on the claim of privilege. The rule, as promulgated by the Supreme Court but not adopted by Congress, stated

"Rule 513.

COMMENT UPON OR INFERENCE FROM CLAIM OF PRIVILEGE: INSTRUCTION

(a) Comment or inference not permitted. The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.

(b) Claiming privilege without knowledge of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.

(c) Jury instruction. Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom."

This approach is in accord with pre-existing practice in the federal courts. See, e.g., Courtney v. United States, 390 F.2d 521, 527 (9th Cir.), cert. denied, 393 U.S. 857, 89 S.Ct. 98, 21 L.Ed.2d 126, rehearing denied, 393 U.S. 992, 89 S.Ct. 440, 21 L.Ed.2d 457 (1968).

In sum, there exist substantial safeguards which guarantee continued secrecy for confidential communications improperly disclosed to a grand jury. Dismissal of an indictment would add little to these protections.

A second objective of Rules 1101(c) and (d) may be to supplement the traditional function of the privileges themselves in encouraging the formation of protected confidential

relationships and free and frank discussion within those relationships. See, e.g., Wigmore, Evidence §§ 2285, 2286, 2290, 2291, 2332, 2333 (McNaughton rev. 1961); McCormick, Evidence §§ 72-74, 78, 87, 98 (Cleary ed. 1972). It should be observed, however, that only a small fraction of attorneys, spouses, physicians, and other privileged communicants are called before grand juries. Those that are called are already guaranteed their authority to claim the privilege by Rule 1101. Attorneys, in particular, are under a professional ethical obligation to refuse to disclose confidential matters. A.B.A. Code of Professional Responsibility, Canon 4. Their training should alert them to the issue so that inadvertent breaches are unlikely. See, In Re Stolar, 397 F.Supp. 520 (S.D.N.Y. 1975); United States v. Mitchell, 372 F.Supp. 1239 (S.D.N.Y. 1973), and In Re Terkeltoub, 256 F.Supp. 683 (S.D.N.Y. 1966). It would thus appear that a rule guaranteeing dismissal of an indictment should a privilege be erroneously breached, would constitute, at best, a wholly speculative, marginal incentive to the formation of confidential relationships. In United States v. Calandra, the Court refused to extend the exclusionary rule to grand juries because of the slight incremental deterrent impact on police misconduct of such extension.

The preservation of the testimonial privileges in grand jury proceedings also serves to prevent governmental interferences with the protected relationships. An attorney or spouse, for instance, is very often a fertile source of incriminatory information. Without the Rule a privileged communicant called as a witness would face the problem of choosing between disclosing confidential matter, testifying falsely, and possibly incurring contempt by remaining silent. It is at least arguable that the risk of a dismissal of any resulting indictment is the only effective means of discouraging zealous prosecutors from improperly seeking privileged matter for grand juries in violation of Rules 1101(c) and (d). If valid, such an hypothesis would directly support the exercise of the court's supervisory power. In this connection, a line of Second Circuit decisions dealing with the use of hearsay in grand jury proceedings is particularly instructive.

In United States v. Umans, 368 F.2d 725 (2d Cir. 1966), cert. granted, 386 U.S. 940, 87 S.Ct. 975, 17 L.Ed.2d 872, cert. dismissed as improvidently granted, 398 U.S. 80, 88 S.Ct. 253, 19 L.Ed.2d 255 (1967), the Court strongly admonished the government not to make excessive use of hearsay:

> "While we are not condemning the procedure used here before the grand jury, we think it not amiss for us to state that excessive use of hearsay in the presentation of government cases to grand juries tends to destroy the historical function of grand juries in assessing the likelihood of prosecutorial success and tends to destroy the protection from unwarranted prosecutions that grand juries are supposed to afford to the innocent. Hearsay evidence should only be used when direct testimony is unavailable or when it is demonstrably inconvenient to summon witnesses able to testify to facts from personal knowledge."

368 F.2d at 730.

In United States v. Arcuri, 282 F.Supp. 247 (E.D.N.Y.), aff'd, 405 F.2d 691 (2d Cir. 1968), cert. denied, 395 U.S. 913, 89 S.Ct. 1760, 23 L.Ed.2d 227 (1969), this court after reviewing the decisions refused to overturn an indictment, despite the unjustified reliance on hearsay by the government, because the grand jury could not possibly have failed to indict on the basis of the non-hearsay evidence. But the government's continuing failure to comply with the Second Circuit's admonition in Umans was felt to warrant a stronger rule and more uniformly applied sanctions. It was held that a timely motion to dismiss an indictment handed down after March 31, 1968 would be granted without

a showing of prejudice to the defendant if it were clear that hearsay alone was deliberately relied upon when better evidence was readily available. This local dismissal rule has been exercised on at least one occasion. See United States v. Chesimard, 72 CR 5 (oral decision 1975).

Finally, in United States v. Estepa, 471 F.2d 1132 (2d Cir. 1972), the Court of Appeals ordered an indictment dismissed because of the deliberate and misleading presentation of hearsay to the grand jury. The Court reached the conclusion that the time had arrived for the exercise of its supervisory power on the basis of the following considerations:

> "We had hoped that, with the clear warnings we have given to prosecutors, . . . and the assurances given by United States Attorneys, . . . a reversal for improper use of hearsay before the grand jury would not be required. Here the Assistant United States Attorney, whether wittingly or unwittingly -- we prefer to think the latter, clearly violated the first of these provisos. We cannot, with proper respect for the discharge of our duties, content ourselves with yet another admonition; a reversal with instructions to dismiss the indictment may help to translate the assurances of the United States Attorneys into consistent performance by their assistants."

471 F.2d 1136-37.

The upshot of these decisions is that just as a court may exercise its supervisory powers to enforce the standards of prosecutorial conduct implicit in the Fifth Amendment grand jury guarantee, so too the court may exercise those powers to enforce the standards of prosecutorial conduct contemplated by Rules 1101(c) and (d) of the Federal Rules of Evidence. But, in determining whether to quash a facially valid indictment, the court must weigh the added deterrent effect of a dismissal against the substantial countervailing considerations articulated by the Supreme Court in Costello. Such an assessment turns, for the most part, on the deliberateness of the government's conduct, the egregiousness of the violation and the extent to which the defendant has been prejudiced. In the absence of these factors, the court should consider whether the challenged practice contravenes an outstanding judicial admonition or a prior statement of policy by the government.

Other cases have adopted a similar discretionary approach to the exercise of the court's supervisory power where similar values have been threatened by prosecutorial misconduct. See, United States v. Fox, 425 F.2d 996, 1001

(9th Cir. 1970) (motion to quash indictment on ground that prosecutor had inaccurately informed grand jury that defendant had a long record addressed to discretion of trial court; discretion not abused where other competent evidence had been presented to the grand jury and misrepresentation by prosecution was not deliberate); United States v. Tane, 329 F.2d 848, 853-4 (2d Cir. 1964) (trial court had discretion to dismiss indictment based wholly on testimony procured as fruit of illegal wiretap); United States v. Thomas, 342 F.2d 132 (6th Cir.), cert. denied, 382 U.S. 855, 86 S.Ct. 105, 15 L.Ed.2d 92 (1965) (motion to dismiss indictment on ground that presentation of testimony to grand jury violated prior promise by government not to use certain evidence against defendants properly denied where other competent evidence had been presented but some counts quashed); United States v. Pepe, 367 F.Supp. 1365 (D.Conn. 1973 (although dismissal of indictment not required for violation of defendant's privilege against self-incrimination, court would exercise discretion to dismiss where prosecutor's conduct was deliberate and flagrant); United States v. Abbott Laboratories, 369 F.Supp. 1396 (E.D.N.C. 1973) (indictment dismissed because

prosecutor deliberately introduced by questions and remarks irrelevant evidence designed to inflame grand jury and create prejudice).

By any of these standards, the indictment in this case should not be dismissed. The claim of privilege here is at best tenuous. Defendants have not alleged that the government acted with bad faith in questioning Mr. Mazza. The Assistant United States Attorney who handled this case has presented an affidavit which discloses that he and Mr. Mazza carefully considered in advance the problems raised by the attorney-client privilege and concluded after discussion that Mr. Mazza's testimony would not disclose confidential matters. Moreover, the defendants were not meaningfully prejudiced by Mr. Mazza's appearance. Even in the absence of his testimony, the grand jury could not conceivably have failed to indict.

III.

OBLIGATION OF UNITED STATES ATTORNEY

To comply with the policy of Rule 1101 the United States Attorney should not knowingly violate a privilege before the grand jury. He should be sensitive to possible problems. If there is any substantial possibility of a

valid claim of privilege he should bring this fact to the attention of the witness, advising the witness of the right to consult counsel; to have the court appoint a lawyer if he cannot afford one; to refuse to answer questions if he believes a privilege may be involved; and to be brought before the court for a ruling.

The policy of the United States Attorney for the Eastern District of New York apparently is to comply with these guidelines. He and his staff, so far as this court is aware, follow the American Bar Association's Standards Relating to the Prosecution Function (Approved Draft 1971). Standard 3.6 provides:

> "Quality and scope of evidence before grand jury.
>
> (a) A prosecutor should present to the grand jury only evidence which he believes would be admissible at trial. However, in appropriate cases the prosecutor may present witnesses to summarize admissible evidence available to him which he believes he will be able to present at trial."

See also, Standards 3.1(a); 3.5(b).

IV.

CONCLUSION

There is no suggestion that the United States Attorney for the Eastern District of New York deliberately and improperly placed privileged information before the grand jury. The indictment was supported by ample non-privileged evidence. Accordingly, the motion to dismiss the indictment is denied.

So ORDERED.

Dated: Brooklyn, New York
November 14, 1975.

U. S. D. J.

RED:HJF:mt
F.#741,964

D1

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - x

UNITED STATES OF AMERICA

- against -

JEROME MACKEY, RICHARD E. TAYLOR and WILLIAM NELSON,

Defendants.

- - - - - - - - - - - - - - - - - - x

Cr. No. _____
(T. 18, U.S.C., §1341 and §2)

75CR 468

THE GRAND JURY CHARGES:

COUNTS ONE THROUGH FIFTEEN

1. At all times material herein, the defendant JEROME MACKEY was President of Mackey Distributors, Inc.

2. At all times material herein, the defendant RICHARD E. TAYLOR was Vice President of Mackey Distributors, Inc.

3. At all times material herein, the defendant WILLIAM NELSON was Secretary-Treasurer of Mackey Distributors, Inc.

4. At all times material herein, Mackey Distributors, Inc. was a corporation organized and existing under the laws of the State of New York with offices at 175 Fulton Avenue, Hempstead, New York, and purported to engage in the business of selling stereo tape distributorships.

5. Commencing on or about April 1, 1972, and continuing thereafter until at least March 1, 1973, the exact dates being unknown to the grand jury, within the Eastern District of New York, the defendants JEROME MACKEY, RICHARD E. TAYLOR, and WILLIAM NELSON did knowingly and wilfully devise and intend to devise a scheme and artifice to defraud prospective stereo tape distributors and to obtain money from these distributors by means of false and fraudulent pretenses, representations, and promises, well knowing at the time that the pretenses, representations, and promises would be and were false and fraudulent when made, which scheme and artifice is set forth hereinafter.

6. It was part of the scheme and artifice that the defendants JEROME MACKEY, RICHARD E. TAYLOR, and WILLIAM NELSON would and did start a distributorship business under the name of Mackey Distributors, Inc., in which they would sell stereo tape distributorships to prospective distributors.

7. It was a further part of the scheme and artifice that the defendants JEROME MACKEY, RICHARD E. TAYLOR, and WILLIAM NELSON would and did cause advertisements, offering for sale stereo tape distributorships, to be placed in various newspapers through out the United States to attract potential distributors.

8. It was a further part of the scheme and artifice that the persons responding to the advertisements would be induced to purchase stereo tape distributorships, and would be told that the nature of the business was as follows:

(a) Each distributor would purchase cabinets, each containing 40 stereo tapes.

(b) The cabinets would be located in various stores and places of business by "professional locators" employed by Mackey Distributors, Inc.

(c) The minimum number of cabinets sold to a distributor would be ten, and the cost to the distributor for the ten cabinets containing a total of 400 tapes placed in ten locations would be approximately $2,375.

(d) The merchants on behalf of the distributor would display the cabinets in their stores and sell the tapes to the general public.

(e) From time to time the distributor would restock the cabinets with stereo tapes and collect from the merchants where the cabinets were located proceeds from the sale of the tapes.

(f) Both the merchant and the distributor would make approximately one dollar on the sale of each tape.

9. It was a further part of the scheme and artifice that the distributors would be induced to make full payment for

the purchase of the distributorships in advance of receiving the cabinets, tapes and locations.

10. It was a further part of the scheme and artifice that the defendants JEROME MACKEY, RICHARD E. TAYLOR, and WILLIAM NELSON would and did make and cause to be made the following false and fraudulent pretenses, representations, and promises to the prospective distributors, well knowing that these pretenses, representations, and promises would be and were false and fraudulent when made:

(a) That Mackey Distributors, Inc., would furnish "major label" first quality tapes to the distributors;

(b) That skilled "professional locators" would locate the cabinets and stereo tapes in highly marketable locations.

(c) That the cabinets each containing 40 stereo tapes, would be provided in full and completely located within two to three weeks after payment in full was received.

(d) That the prospective distributors had a money back guarantee, in that after one year Mackey Distributors, Inc., would repurchase the distributorships if so requested by the distributors;

(e) That Mackey Distributors, Inc., would relocate cabinets where the location averaged less than five tape sales per week.

11. It was a further part of the scheme and artifice that the defendants JEROME MACKEY, RICHARD E. TAYLOR, and WILLIAM NELSON would and did cause literature to be prepared and furnished to prospective distributors, containing the false and fraudulent representation that Mackey Distributors, Inc., was a wholly owned subsidiary of Jerome Mackey's Judo Incorporated, these defendants well knowing at the time that this representation would be and was false and fraudulent when made.

12. It was a further part of the scheme and artifice that the defendants RICHARD E. TAYLOR and WILLIAM NELSON would and did cause prospective distributors to be furnished with a list of

references of purportedly successful distributors of Mackey Distributors, Inc., and that the following false and fraudulent representations would be and were made to prospective distributors by two of the references, these defendants well knowing at the time that the representations would be and were false and fraudulent when made:

(a) That these two references were distributors of Mackey Distributors, Inc.;

(b) That their distributorships were successful.

13. It was a further part of the scheme and artifice that when distributors inquired as to why Mackey Distributors, Inc., had not performed the terms of the distributorship contract, the defendants JEROME MACKEY, RICHARD E. TAYLOR, and WILLIAM NELSON would and did make and cause to be made false and fraudulent explanations to the distributors concerning their failure to perform in order to stall the distributors, well knowing at the time that the explanations would be and were false and fraudulent when made.

14. On or about each of the dates hereinafter set forth, within the Eastern District of New York, for the purpose of executing the scheme and artifice and attempting to do so, the defendants JEROME MACKEY, RICHARD E. TAYLOR, and WILLIAM NELSON caused their advertising agent to place in post offices and authorized depositories for mail matter in Hempstead, New York, various envelopes containing advertisements to be sent and delivered by the United States Postal Service as hereinafter set forth in Counts One through Fifteen.

COUNT	DATE OF MAILING	ADDRESSEE
One	August 17, 1972	Minneapolis Star Tribune 427 Port Minneapolis, Minnesota 55415
Two	August 24, 1972	Boston Globe 135 Morrissey Blvd. Boston, Mass. 02107
Three	August 24, 1972	The Telegraph 62 Main Street Nashau, New Hampshire 03060

Four	September 9, 1972	The Utica Press 221 Oriskany Plaza Utica, New York 13508
Five	September 23, 1972	Times Independant Box 1121 490 First Avenue, S. St. Petersberg, Florida 33731
Six	September 24, 1972	Chicago Tribune 435 N. Michigan Avenue Chicago, Illinois 60611
Seven	September 25, 1972	Pittsburgh Press Box 566 Pittsburgh, Pa. 15230
Eight	October 1, 1972	Philadelphia Inquirer 400 N. Broad Street Philadelphia, Pa. 19101
Nine	October 8, 1972	Chicago Sun Times 401 N. Walbash Avenue Chicago, Ill. 60611
Ten	October 12, 1972	Houston Chronicle 801 Texas Avenue Houston, Texas
Eleven	October 15, 1972	Kansas City Times 1729 Grand Kansas City, Missouri
Twelve	October 15, 1972	Washington Post 1150 15th Street, N.W. Washington, D.C. 20071
Thirteen	October 16, 1972	Houston Post 4747 S.W. Freeberg Houston, Texas 77001
Fourteen	November 5, 1972	Baltimore News American Lombard & South Streets Baltimore, Maryland 25202
Fifteen	November 11, 1972	Journal Gazzette 600 W. Main Street Fort Wayne, Indiana 46802

In violation of Title 18, United States Code, Sections 1341 and 2.

COUNTS SIXTEEN THROUGH TWENTY-ONE

1. The Grand Jury incorporates by reference and realleges herein all of the allegations contained in paragraphs "1" through "13" of Counts One through Fifteen of this indictment.

2. On or about each of the dates hereinafter set forth, within the Eastern District of New York, for the purpose of executing the aforesaid scheme and artifice and attempting to do so, the defendants JEROME MACKEY, RICHARD E. TAYLOR and WILLIAM NELSON did take and receive and cause to be taken and received from the United States mails various envelopes containing checks which had been delivered by the United States Postal Service to Mackey Distributors, Inc., 175 Fulton Avenue, Hempstead, New York from the following distributors-mailors:

COUNT	DATE	DISTRIBUTOR-MAILOR
Sixteen	September 14, 1972	Mr. Paul Suk
Seventeen	September 25, 1972	Mr. Fred Cole
Eighteen	September 28, 1972	Mrs. Thomas Connor
Nineteen	October 30, 1972	Mr. John Metzger
Twenty	November 8, 1972	Mr. Mort Flynn
Twenty-One	November 14, 1972	Mr. Dale Webb

In violation of Title 18, United States Code, Sections 1341 and 2.

A TRUE BILL

J. Lucot
FOREMAN.

David G. Trager
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK